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In The Supreme Court of the United States

OCTOBER TERM, 1978

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-65a) is reported at 586 F.2d 280. The district court's order (Pet. App. 23a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on September 29, 1978. Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including February 26, 1979 (Pet. App. 68a, 69a). The petition was filed on that date

and was granted on April 16, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). We discuss at pages 17–21, *infra*, a question about this Court's jurisdiction.

QUESTIONS PRESENTED

Whether residents of a nursing home who are eligible for benefits under the Medicaid Program, 42 U.S.C. 1396 *et seq.*, have a constitutional right to notice and an opportunity for a hearing before federal and state agencies may decide that the nursing home is unqualified to participate in the program.

STATUTES INVOLVED

Pertinent parts of Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act, 42 U.S.C. 1395 to 1396j, are set forth in an appendix, *infra*.

STATEMENT

A. *The Statutory and Regulatory Background*

Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, 42 U.S.C. 1395 to 1396j, establish programs for medical assistance to aged, disabled and financially needy persons.[1] The Medicaid program, which is primarily involved in this case, is jointly funded and administered by the federal government (through the Department of Health, Education, and Welfare) and participating states. States desiring to

[1] Medicare provides medical assistance primarily to aged and disabled persons (42 U.S.C. 1395c); Medicaid provides medical assistance primarily to financially needy persons (42 U.S.C. 1396).

participate in the Medicaid program must submit for the Secretary of HEW's approval plans for medical assistance; these must meet the statutory criteria set forth in 42 U.S.C. 1396a(a). Under such plans, qualified providers of medical services, such as skilled nursing facilities, enter into agreements of not more than 12-months' duration with the responsible state agency. The provider agrees to furnish medical services to eligible patients, and the agency agrees to pay the provider for such services.[2] The federal government then reimburses the state agency for a portion of these payments.[3] 42 U.S.C. 1396a(a)(23) also provides that state plans "must * * * provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required* * *."

The states are primarily responsible for administering the Medicaid program.[4] Under the statute and implementing HEW regulations, the states are responsible for determining the eligibility of patients for statutory benefits although HEW's regulations set out certain rules on the exercise of that function. For example, the regulations provide that before a state may terminate, suspend or reduce a patient's assistance, it must give the patient notice and an opportunity for a hear-

[2] 42 U.S.C. 1396a(a)(27) and (28). Medicare providers enter into similar agreements directly with HEW, and federal payments are made directly to the providers. 42 U.S.C. 1395f(a), 1395cc.

[3] 42 U.S.C. 1396b, 1396d(b).

[4] In contrast, the Medicare program is administered primarily by HEW.

ing.[5] The regulations also provide, in relevant part, that a participating nursing home must adopt policies and procedures to ensure that each resident "[is] transferred or discharged only for medical reasons or for his welfare or that of other patients * * *."[6]

The states and HEW share responsibility for determining whether particular nursing homes are qualified to participate in both the Medicare and Medicaid programs under the standards set forth in the statutes, regulations and state plans.[7] Before it may participate in either the Medicare or Medicaid program, the home and its administrator must be licensed or approved by the responsible state agency[8] and must obtain a certification from the Secretary of HEW that it is qualified to participate.[9] A home must satisfy statutory and regulatory requirements of health care, safety and sanitation;[10] state agencies (and, to a lesser extent, HEW)

[5] 45 C.F.R. 205.10(a)(5).

[6] 42 C.F.R. 449.12(a)(1)(ii)(B)(4).

[7] The standards for eligible nursing homes (or "skilled nursing facilit[ies]") set forth in Title XIX (Medicaid) incorporate by reference the standards set forth for such facilities in Title XVIII (Medicare). See 42 U.S.C. 1396a(a)(28), 1395cc(c)(2), 1396i.

[8] 42 U.S.C. 1395x(j)(9); 42 U.S.C. 1396g.

[9] 42 U.S.C. 1395cc(a); 42 U.S.C. 1396i(a). If, as in this case, a home participated in both the Medicare and Medicaid programs (*i.e.*, is a "dual facility"), it must obtain a certificate from the Secretary of HEW to participate in both programs. If it is a Medicaid-only provider, the states are solely responsible for qualifying the facility pursuant to the HEW-approved state plan and the standards set forth in the statutes and HEW regulations. There are other differences in the statutes and regulations between dual and Medicaid-only facilities that are not pertinent here and will not be discussed.

[10] 42 U.S.C. 1395x(j); 42 U.S.C. 1396a(a)(28).

conduct periodic surveys of facilities to ensure that those requirements are satisfied.

The Secretary of HEW may terminate a Medicare provider agreement (and thus a facility's participation in that program) whenever, on the basis of either state or HEW surveys, he determines that the facility is no longer in compliance with the terms of the agreement or the requirements of the statute or regulations.[11] HEW regulations under Medicaid require the participating state to terminate any Medicaid provider agreement on notification that HEW has not renewed, or has terminated, a facility's Medicare provider agreement.[12]

HEW must give a facility reasonable notice (defined in the regulations as not less than 15 days) before the effective date of termination.[13] When HEW gives a notice of termination to the home (referred to as an "initial determination"),[14] the statute and regulations provide several administrative remedies. First, the home may seek "reconsideration" of the initial determi-

[11] 42 U.S.C. 1395cc(b)(2)(A). The regulations distinguish for some purposes between a decision not to renew a provider agreement after the expiration of its one-year term and a decision to terminate an agreement during its term. See 42 C.F.R. 405.604(c)(2) and 42 C.F.R. 405.614. Both decisions, however, constitute an initial determination that the provider is not qualified, and both trigger the same administrative appeal procedures (*ibid.*). In this brief we sometimes use the term "termination" to refer to either decision.

[12] 42 C.F.R. 449.33(a)(9).

[13] 42 U.S.C. 1395cc(b)(2); 42 C.F.R. 405.614(b). Federal funding for services to patients continues for as long as 30 days after the effective date of the facility's termination, in order to provide for orderly relocation or other accommodations for the patients. 42 C.F.R. 449.10(d)(3)(ii).

[14] 42 C.F.R. 405.604(c)(2); 42 C.F.R. 405.1502.

nation, which entails a thorough review of the initial decision but not an evidentiary hearing.[15] If, after reconsideration, HEW affirms the initial decision to terminate, the facility is entitled to a full evidentiary hearing before the agency and, ultimately, to judicial review.[16] Under the statute and regulations, however, neither a request for reconsideration nor a request for an agency hearing postpones the effective date of the termination of payments to the home.

Procedures established by HEW for the conduct of nursing home certification surveys by state agencies (surveys must be conducted at least once a year in view of the maximum 12-month duration of provider agreements) provide for observations and interviews of patients on a number of matters.[17] The statutes, regulations, and procedures, however, do not provide Medicare or Medicaid patients with a right to notice or opportunity for a hearing, either before or after termination of the home, with respect to the decision to terminate the home's participation in the programs.

B. *Proceedings Below*

1. Respondent Town Court Nursing Center, Inc., is a 198-bed nursing home in Philadelphia, Pennsylvania

[15] 42 C.F.R. 405.1510–1518.

[16] 42 U.S.C. 1395ff(c); 42 C.F.R. 405.1530.

[17] See Department of Health, Education, and Welfare, *State Survey Agency: Long Term Care Manual* (1975). Appendix A of this Manual establishes survey procedures for state agencies responsible for surveying skilled nursing facilities. The procedures require that the surveyors interview a sample of patients with respect to such matters as the patients' understanding of their rights and their finances, the general treatment of patients, the quality of nursing care, the quality of food service, and the adequacy of patient activities.

(A.17a). Town Court was certified by HEW in 1967 as a "skilled nursing facility" and thus became eligible for program participation (A.31a). Although subsequent certification surveys revealed various deficiencies, Town Court remained in operation through 1973 by submitting plans for correcting the deficiencies. In 1974, however, a series of inspections revealed substantial noncompliance.[18] and Town Court was terminated as a Medicare and Medicaid provider (A.32a–33a).

Town Court was recertified in 1976 and entered into Medicare and Medicaid provider agreements with HEW (for Medicare) and the Pennsylvania Department of Public Welfare (for Medicaid) (A.33a). Shortly after the issuance of the 1976–1977 provider agreements, a special state grand jury was empanelled to study conditions in nursing homes in Philadelphia. In response to complaints of the grand jury about Town Court (C.A. App. 474–499),[19] HEW conducted its own survey of the home in July 1976 (A.33a–34a, 61a–108a). The survey was conducted over the course of a week; it involved examination of some 66 patient files and direct observations and interviews with patients, and the surveyors

[18] Surveyors cited the following findings: prescribed medications not administered or incorrectly administered; no vital signs recorded for weeks; nursing care plans not done or incomplete; patients' complaints of rough handling and verbal abuse; scheduled nursing personnel not present; no food or juice available; soiled bedpans and catheter bags on floor; and strong odor of urine present (A. 39a–48a, 50a–57a, 60a–61a). The survey teams concluded that the conditions in the facility constituted a threat to the health and safety of its patients and recommended termination of its participation (A.54a, 61a).

[19] "C.A. App." refers to the appendix to the briefs in the court of appeals.

found significant deficiencies (*ibid.*).[20] HEW furnished these findings to the State's survey agency and requested further investigation (A.63a).

The State's survey agency conducted a series of surveys and meetings with Town Court. These surveys, conducted in November 1976 and March 1977, revealed numerous deficiencies relating to inadequate nursing and physician services, physical environment, medical records, management, medical direction and pharmaceutical services.[21] The State recommended that HEW not renew Town Court's Medicare provider agreement, which was due to expire April 30, 1977. By letter of May 17, 1977, HEW notified Town Court of its decision to terminate the facility's participation in the Medicare program and set the effective date of termination as June 18, 1977 (A. 294a–296a). The letter stated that no Medicare payments would be made to Town Court for services to Medicare beneficiaries furnished after July 17, 1977 (A. 297a). As required by the statute and regulations, on May 20, 1977, the Pennsylvania Department of Public Welfare notified Town Court of its termination from the Medicaid program as well (A. 291a–293a). Town Court then requested that HEW reconsider the termination decision (A. 28a).[22]

2. On July 20, 1977, before HEW had acted on its request for reconsideration, Town Court and six of its patients[23] filed this action in the United States District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief (A. 7a–14a). The home contended that it is constitutionally entitled to a full evidentiary hearing prior to its termination as a provider (A. 9a–10a, 12a). The patients contended that they also were entitled to a hearing before the home's termination, on the ground that they would suffer a loss of benefits if the home were decertified (A. 11a).

On July 27, 1977, the district court granted a preliminary injunction, enjoining the State and HEW from (1) discontinuing or withholding payments to Town Court for the care of Medicare and Medicaid beneficiaries; (2) removing patients from the home; or (3) prohibiting the placement of new patients at the home, until HEW had

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[20] The HEW survey concluded, *inter alia*, that "[t]here is no evidence that the medical director is involved in the coordination of medical care in the facility" (A.64a) and that a pattern of poor nursing care was jeopardizing the health and safety of patients (*id.* at 71a). The survey took particular note of patient injuries and faulty nursing techniques (*id.* at 70a–72a).

[21] A state survey in November 1976 found serious deficiencies in nursing care and sanitation. Observations included patients in need of showers, with dirty and torn clothing, and barefoot. Patient areas were dirty, roaches were observed, and urine odor was prevalent. Medical records were seriously deficient (A.111a–113a). In March 1977 a combined Medicare/Medicard certification and state licensing survey found that significant deficiencies continued to exist (C.A. App. 341–412), and these findings were submitted to HEW with the recommendation that the home's provider agreements not be renewed.

[22] In May 1977, the special investigating grand jury filed a presentment against Town Court, recommending filing of charges of reckless endangerment of the lives of the patients, violations of state regulations, and theft by deception. The basis for the charge of reckless endangerment included two cases of gangrene that progressed unobserved until amputation was required (C.A. App. 479–482), as well as testimony by a physician which indicated that 12 out of 13 files reviewed revealed "serious deficiencies in patient care" that necessitated hospitalization (*id.* at 483).

[23] The suit was brought as a proposed class action on behalf of the 180 Medicaid patients at Town Court (A. 11a). The district court made no determination concerning the request for class certification.

acted on Town Court's application for reconsideration (C.A. App. 222–223).[24]

On September 9, 1977, HEW notified Town Court that the initial termination decision had been affirmed on reconsideration (A. 28a). The plaintiffs then asked the district court to extend the preliminary injunction (A. 28a–29a). On September 15, 1977, the district court entered an order stating (A. 117a):

> That plaintiffs' Motion is DENIED, and the preliminary injunction is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

Town Court and its patients filed separate appeals from the portion of the district court order adverse to them, and the Secretary of HEW appealed from the portion of the judgment adverse to him. Petitioner's predecessor did not file an appeal; he appeared as an appellee in the court of appeals.

The court of appeals, sitting en banc, issued two separate opinions. The court held that Town Court was not constitutionally entitled to a pretermination evidentiary hearing. *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266 (3d Cir. 1978) (hereinafter "nursing home"). Relying on *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975), the court held that the home's right under the statutes and regulations to an evidentiary hearing after termination is adequate to satisfy the Due Process

[24] The preliminary injunction was entered orally (C.A. App. 222). The court stated that the temporary restraining order issued on July 21, 1977 (A. 22a–23a) would remain in effect and that "[i]t is understood" that the defendants would not intentionally remove patients or prohibit the placement of new patients (C.A. App. 222–223).

Clause (586 F.2d at 277–278). It observed, as a particularly relevant consideration, that providing pretermination hearings to providers would place substantial burdens on "the scarce financial and administrative resources" of the responsible agencies and would be adverse to the "strong [public] interest in insuring that elderly and infirm nursing home patients are not required to stay in non-complying homes* * *" (*id.* at 278).[25] Town Court did not file a petition for a writ of certiorari to review this decision.

The patients fared better than the home. The court concluded that the patients have a constitutional right to a hearing before the home's participation in the program can be ended (Pet. App. 27a–60a; hereinafter "patients"). The opinion for four of the nine judges (*id.* at 27a–30a) relied entirely on the opinion of the court filed the same day in *Klein* v. *Califano*, 586 F.2d 250 (3d Cir. 1978) (en banc). In *Klein* the court acknowledged that the termination of a nursing home's eligibility does not affect the patients' eligibility for or right to benefits under the Medicare and Medicaid programs (586 F.2d at 257), but it nevertheless concluded (*id.* at 258) that the statutes and regulations gave the patients a "prop-

[25] The court of appeals therefore directed (568 F.2d at 280) that "[t]he order of the district court refusing to extend portions of the preliminary injunction will be affirmed as to Town Court. The order of the district court continuing in effect part of the preliminary injunction will be reversed as to Town Court * * *."

Although the court concluded that Town Court had asserted a claim against petitioner that rested "on a basis independent from that supporting the claim against Secretary Califano" (586 F.2d at 279), it held that petitioner also was not required to provide Town Court with a pre-termination hearing in view of the adequacy of Town Court's rights to a post-termination hearing under the entire statutory and regulatory system (*id.* at 280).

erty" interest in continued residence in a particular nursing home:

> Because a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

See also Pet. App. 29a. The court in patients therefore held that "the portion of [the district court's] order from which Secretary Califano appeals will be affirmed" (*id.* at 30a). The opinion of the four judges here—like the court's opinion in *Klein*—declined to express a view on what sort of pre-termination hearing would be required; the court instead remanded the case to the district court for further proceedings on that question (*ibid.*).

A concurring opinion for four judges (including two of the four who joined the opinion announcing the judgment), concluded that, although the interests of patients created by the statutes and regulations (relied on by the lead opinion) might not, taken alone, amount to a "property" interest, "when viewed together, they compel the conclusion that they identify three aspects of an 'underlying substantive interest' that enjoys the stature of property" (Pet. App. 39a, quoting from *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1, 9 (1978)). The concurring opinion also concluded that the practical effect of the home's termination on patients supported the conclusion that they have a property interest in its continued participation (Pet. App. 44a-45a); the concurrence stated that the growth of federal welfare programs should make courts "alert for and receptive to claims for due process protection of these new forms of property* * *" (*id.* at 46a).[26]

Three judges dissented (Pet. App. 60a-67a). In their view, the statutes and regulations provide Medicare and Medicaid beneficiaries with no "property" interest in the continuation by the home in which they reside of participation in the programs. Thus, the dissenters reasoned, the patients have no constitutional right to a hearing with respect to the home's termination (*id.* at 62a). The dissenting opinion also noted that existing state and federal procedures provide for significant contributions by patients to the survey process and that the home itself reasonably "may be expected to adduce the best case for continued certification" (*id.* at 63a-65a).

SUMMARY OF ARGUMENT

I

Although petitioner's predecessor did not file an appeal from the portion of the district court judgment adverse to petitioner, this Court may review

[26]The concurring opinion also addressed the question, not reached in *Klein* or in the opinion announcing the judgment, of what sort of hearings are constitutionally required (Pet. App. 46a-59a). Although the concurring opinion described as "informal and flexibly-structured" (Pet. App. 56a) the procedures the four judges would require, these procedures included "assembl[ing] the residents of the facility for an informal opportunity to express their views"; an explanation of the "contemplated [termination], the reasons for it, and its potential effect on the patients"; supplemental "individual interviews with those patients who did not attend"; an "opportunity to present material both orally and in writing * * * and [if necessary] assistance in formulating their responses"; and similar opportunities for "relatives, friends, or other representatives" (*id.* at 57a-58a).

petitioner's contention that nursing home patients have no "property" interest in the continued participation of a particular nursing home in the Medicaid program. The court of appeals had jurisdiction to decide that question in petitioner's favor because the Secretary of HEW appealed from the portion of the judgment in question, and petitioner was not required to file a separate and duplicative appeal. The court of appeals having fully considered the question and decided it adversely to petitioner, she may seek this Court's review.

II

Whether a person who is affected by governmental action is entitled to the procedural protections of the Due Process Clause depends on whether "liberty" or "property" is at stake. Whether an interest is "liberty" or "property" depends not on the magnitude of the effect of governmental action on a person but on whether the person has a legitimate claim of entitlement in the matter. The principal sources of such expectations, particularly in this context, are statutes and rules having the force of law. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

A. Nothing in the Medicare or Medicaid statutes and their implementing regulations establishes or suggests any right on the part of patients to benefits for medical care provided to them by a *particular* nursing home. The statutes and regulations establish that eligible patients have a right to covered care only from any "institution * * * qualified to perform the

service" (42 U.S.C. 1396a(a)(23)) under statutory standards defining qualified institutions and under statutory procedures for determining the qualifications of nursing homes and other providers of covered medical services. As the court of appeals acknowledged, a determination by the Secretary of HEW and responsible state officials that a particular home is not qualified does not affect either a patient's eligibility for benefits or the level of benefits provided in fact. A home's lack of qualification is a legitimate ground for terminating Medicare and Medicaid payments to the home and thus requiring patients to move to another home. No patient has a legitimate claim of entitlement that a particular place be found "qualified." The patients thus have no "property" interest in the status of a particular home as a qualified provider and no constitutional right to notice and a hearing on determinations of that status.

B. Although the court of appeals' analysis of the statutory scheme and the constitutional issues is not entirely clear, the opinion announcing the judgment of the court suggests that even if the patients' interest is only in receiving care from a qualified home, a determination that a particular home is not qualified impinges sufficiently on that interest that "property" is at issue. That view finds no support in this Court's decisions, and, if accepted, it would require due process procedures in innumerable situations in which no one could have a reasonable expectation of entitlement. It would mean that whenever governmental action directed primarily against the interests of one party (*e.g.*, the termination or non-renewal of a company's defense contract) affects the constitutionally protected interests of other persons (*e.g.*, the com-

pany's employees' right to work for an employer of their choice), each person thus indirectly affected would have a separate and personal right to notice and hearing on that action. That view would make the nature of the affected interest largely irrelevant and the weight of the interest controlling, contrary to established principles.

C. The concurring opinion, joined by four members of the court, offers arguments quite distinct from the opinion announcing the judgment of the court. First, the concurring opinion argues that even if no statutory or regulatory provision, considered alone, establishes a "property" interest, together they "paint * * * [a] landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert" (Pet. App. 39a). "Landscapes," however, do not establish legitimate and mutual claims of entitlement. For courts to infer such entitlements not from the precise substantive entitlements established by Congress but from vague and undefined landscapes is simply to override the carefully crafted statutory scheme and to base "property" rights solely on unilateral expectations.

The concurring opinion also argues that the practical consequences of patients' moving from one nursing home to another support judicial recognition of constitutionally protected interests. That conclusion conflicts squarely with decisions establishing that the magnitude of the effect of governmental action, "however serious," is not relevant in determining whether the interest is "liberty" or "property." *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 5.

The concurring opinion's concern that decisions to

terminate the program participation of a nursing home may be important to patients is shared by HEW, which intends to institute rulemaking to consider what procedures should be employed as a matter of administrative policy for enhancing patient participation in the survey and termination process. But those concerns are no basis for finding constitutionally protected property rights. Moreover, the concurring opinion's focus on the consequences to the patients of moving, consequences that would be one factor among many in making a policy decision to offer hearings, overlooks other significant considerations relevant to that decision. For example, all patients have an interest in receiving the level and quality of care that Congress and the states intended. All patients thus are affected by the potency of available sanctions, including termination and non-renewal of provider participation, designed to ensure that homes maintain those statutory standards. A hearing rule that makes the threat of sanctions less effective therefore has a potential to undermine the interests of all patients.

ARGUMENT

I

PETITIONER'S CONTENTIONS MAY BE REVIEWED BY THIS COURT

The district court's order in this case purported to deny in part and grant in part the relief sought by Town Court and its residents (see page 10, *supra*). Because petitioner's predecessor did not appeal from the portion of the order adverse to him, but instead

appeared as appellee in the court of appeals, it may be questioned whether petitioner properly can ask this Court to reverse the court of appeals on grounds that would require vacating the portion of the district court's order that was adverse to petitioner but from which her predecessor did not appeal.

Ordinarily an appellee may, without filing a cross appeal, defend a judgment in his favor on any grounds (including those rejected by the lower court), but he may not ask for an alteration of the judgment in his favor. See, *e.g.*, *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).[27] And if an issue was not properly pre-

[27]Our brief in *New York Telephone* argued that a party who prevailed in a lower court may make any properly preserved argument in support of his judgment. So long as he is content to accept an affirmance, he may even make an argument that, if accepted, would entitle him to greater rights in future cases. In *New York Telephone* itself the lower courts held that warrants may issue authorizing the installation of pen registers, but that courts may not order telephone companies to assist in the installation. The judgment of the lower courts thus was that federal agents could come on the telephone company's property—using force if necessary—to install pen register devices, but that they could not obtain assistance. The telephone company defended this judgment on the ground that no warrant could be issued authorizing the installation of a pen register unless it conformed to the procedural requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510–2520; this contention, if accepted, would have given the telephone company broader rights. The Court nonetheless considered the telephone company's contention, because the company as respondent did not ask for an alteration of the judgment. See also R. Stern & E. Gressman, *Supreme Court Practice* 480–486 (5th ed. 1978), which supports the view that an appellee or respondent, so long as he does not seek alteration of a judgment, may defend the judgment with arguments that call its scope into question.

served in a lower court, this Court ordinarily declines to review it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). We do not believe, however, that these principles now bar petitioner from contending that patients have no "property" interest in Town Court's continued participation in Medicaid.

The holding in favor of the patients was in fact appealed to the court of appeals (albeit by the Secretary of HEW), and the arguments now raised by petitioner were presented to and decided by that court. Petitioner did not file an appeal because it did not need to; there was no reason to file surplus notices of appeal.[28] The court of appeals had power to reverse the part of the district court's judgment that favored the patients; it was asked to do so in a proper fashion;

[28]The Rules of this Court contemplate that appellees and respondents can join appellants or petitioners in urging reversal of judgments without filing separate appeals or petitions. See Rules 10(4), 21(4). Because the grant of review brings up the whole case, the Court can dispose of any challenge to the judgment below, provided that it was both preserved in the lower court and raised in the jurisdictional statement and petition. It would be pointless to require the filing of additional petitions by parties who, although aggrieved by the judgment below, are willing to have the case decided on the basis of the question presented by the first petition. Because of this consideration, the Solicitor General frequently refrains from filing petitions in cases in which other parties have done so, and in such cases the government, although a respondent, asks the Court to reverse the judgments. In addition to this case (in which the Secretary of HEW is a respondent calling for reversal of the judgment), several other cases now before the Court follow this pattern. See, *e.g.*, *Kissinger* v. *Reporters Committee for Freedom of the Press*, cert. granted, No. 78–1088 (Apr. 16, 1979); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, cert. granted, No. 78–1248 (May 14, 1979); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, cert. granted, No. 78–1651 (June 18, 1979). See also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78–575 (June 11, 1979), in which the United

petitioner was aggrieved by the refusal to reverse; and petitioner thus is entitled to seek review of the portion of the judgment from which the Secretary of HEW appealed. Petitioner's right to seek review of the remaining portion of the judgment is even clearer. The Third Circuit reversed, on the patients' appeal, a part of the judgment that had been favorable to petitioner (see Pet. App. 30a). Petitioner surely is authorized to seek review of an adverse judgment that she suffered as appellee in this fashion.

The more difficult question is whether petitioner properly preserved the arguments she now presents to this Court. The brief filed in the court of appeals by petitioner's predecessor stated (page 3) that because "Secretary Beal participates neither in the decision-making of the survey agency nor in the decisionmaking of the federal agency, he will not take a position on the legal or factual issues raised by the appeal. Secretary Beal's role is basically that of a stakeholder and his position should not be inferred to be either for or against the position of either the federal agency or the nursing facility." Because this Court ordinarily considers only arguments properly preserved below, it may be that petitioner's failure to make *any* argument on the merits in the Third Circuit is fatal to petitioner's position.

States, as respondent, requested the Court to reverse the court of appeals' judgment. The United States generally files a petition (after a private petition has been filed) only when it seeks to present for this Court's review a question that was not presented by the first petition. See, *e.g.*, *Marshall* v. *American Petroleum Institute*, cert. granted, No. 78-1036 (Feb. 21, 1979), which was filed in order to present a question that had not been included by petitioners in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, cert. granted, No. 78-911 (Feb. 21, 1979).

Although the question is close, we submit that the Court may consider the arguments now before it. All of the arguments were made to the court of appeals, even if not by petitioner. As we have shown above, petitioner has standing to seek review; the only inhibition concerns the nature of the arguments petitioner may make. And that inhibition is of less concern where, as here, the party who made the contentions in the court of appeals (the Secretary of HEW) has appeared and made them again in this Court. In sum, the court of appeals had jurisdiction, this Court has jurisdiction, the essential arguments were presented to and resolved by the Third Circuit, and they are presented again to this Court by a party who presented them below. This Court therefore should address them.

II

MEDICAID PATIENTS HAVE NO "PROPERTY" INTEREST IN THE PARTICIPATION OF A NURSING HOME IN THE MEDICAID PROGRAM, AND THEY THEREFORE DO NOT HAVE A RIGHT UNDER THE DUE PROCESS CLAUSE TO A HEARING ON THE TERMINATION OF THE HOME'S PARTICIPATION

If a person contends that he is entitled under the Due Process Clause of the Fifth and Fourteenth Amendments to certain procedural protections with respect to governmental action affecting him, courts must engage in a two-step inquiry; first, they must determine

whether the interest allegedly affected is "liberty" or "property" within the meaning of the Clause; if it is, the courts then must determine what process is due under the circumstances. See, *e.g.*, *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 838–847 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 332–335 (1976). The principal issue in this case concerns the first step of the inquiry: whether the respondent patients have a "property"[29] interest in the nursing home's status as a provider.[30]

No one disputes in this case that eligible persons are entitled under the Medicare and Medicaid statutes to covered medical care from qualified providers; eligible persons also have a right under both the statute and the regulations to a hearing before their benefits are terminated. Moreover, as the court of appeals acknowledged, the termination of one provider's participation in the programs does not affect or diminish the patients' entitlement to receive benefits from other qualified providers. *Klein* v. *Califano*, 586 F.2d 250, 259 (3d Cir. 1978) (en banc). Nevertheless, the majority of the en banc court held that the patients have a "property" interest in the continued participation in the program of the particular nursing home in which they resided—an interest that the court derived from rights conferred by the statutes and regulations and from the practical effects of the home's termination on the patients (Pet. App.

[29] If the patients have any cognizable interest under the Due Process Clause, it is more aptly characterized as a "property" interest than as a "liberty" interest, and we will refer to it that way here.

[30] The opinion announcing the judgment addressed the second step of the inquiry only to the extent of holding that a hearing must be held before, rather than after, the effective date of the

27a–30a, 44a–45a).[31] We submit that the court of appeals has misconceived the proper standards for determining "property" interests and misconstrued the rights that the applicable statutes and regulations provide to eligible patients.

A. *Whether An Interest Is "Property" Depends Primarily On Whether The Statutory Scheme Creates A Reasonable and Mutual Legitimate Claim of Entitlement*

The procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction effects the interests of a particular person or group. By its terms, the Clause applies only in those circumstances in which governmental action deprives a person of "liberty" or "property." There is no talismanic test for determining whether a person's interest in a matter is "liberty" or "property," but this Court's decisions have identified a number of relevant principles and considerations.

First, what is relevant is "not * * * the 'weight' but * * * the *nature* of the interest at stake." *Board of Re-*

termination (Pet. App. 29a). It did not, however, prescribe the details of the required procedure, and it remanded for further proceedings on that issue. (*id.* at 29a–30a). As we have noted (note 26, *supra*), the concurring opinion of four of the members of the majority prescribed in some detail what procedures were required (Pet. App. 46a–59a).

[31] The opinion of the court in *Klein* relied primarily on rights believed to have been conferred on patients by specific statutory and regulatory provisions (586 F.2d at 257–258), while the concurring opinion relied more on the "landscape" "paint[ed]" by those provisions (Pet. App. 39a) and on the practical effects of the home's termination on its patients (*id.* at 44a–45a). In this case the views expressed in the concurring opinion are at least as significant as those expressed in the opinion that announced the judgment, because the concurring opinion was joined by four of the six members of the majority. See pages 34–40, *infra*.

gents v. *Roth*, 408 U.S. 564, 571 (1972). See also *Smith* v. *Organization of Foster Families, supra*, 431 U.S. at 840; *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979), slip op. 5: "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." If the "weight" of a decision's consequence were a determinative factor, there would be no discernible limits to the number of interests protected, and the hearings required by the Due Process Clause that would thus be imposed on a host of governmental actions would constitute an enormous, if not intolerable, burden on governmental decisionmaking.[32] See, *e.g.*, *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976).

Second, the nature of the interest must be such that a person has a legitimate claim of entitlement to it. There must be some mutual expectations; a unilateral claim is not enough, even if supported by a course of practice. See, *e.g.*, *Leis* v. *Flynt*, No. 77-1618 (Jan. 15, 1979), which holds that out-of-state lawyers have no property interest in appearing pro hac vice in a state court because they have no expectation of entitlement "derived

[32] For example, whether the government decides to enter into, or cancel, a defense contract with a company may mean the difference between economic prosperity or depression for a large community, but few would contend that every member of the community has a "property" interest in the governmental decision whether Lockheed's latest fighter is faster or a better buy for the government than Northrop's competing plane. If a hearing had to be given to every member of the community on contract questions on which the company itself had a right to be heard, final governmental decisions on such matters would be all but impossible.

from statute or legal rule or through a mutually explicit understanding" (slip op. 5).[33]

Third, legitimate claims of entitlement may be based on several sources, including contract, informal practices, custom and usage;[34] but the principal source of such expectations, and the principal criteria for determining whether they are legitimate and mutual, are statutes and rules having the force of law. As a number of this Court's recent decisions reflect, whether a person has a legitimate claim of entitlement usually depends on a careful analysis of the statutory language, structure and intent. Thus, for example, in *Greenholtz* v. *Nebraska Penal Inmates, supra*, the Court held that Nebraska inmates have a protected interest in parole release only because of the "unique structure and language" of the state statute (slip op. 10). The statute created an expectation of release that could be defeated only by specified findings. In other cases the Court also has emphasized that the existence of a property inter-

[33] The requirement that the person's claim be more than simply unilateral can be illustrated in many ways. For example, a person may have a reasonable expectation of appointment to high executive office, and the appointment may mean a great deal to him and his family, but he clearly has no property interest in the appointment because there is nothing to indicate that the President in fact shares, or has any legal obligation to share, the same expectation.

[34] Practices, custom and usage are enough only if they have acquired a powerful and mutual force. The facts that most prisioners are paroled, that most are not transferred from prison to prison, that most applications to appear pro hac vice are granted, and that most teachers' contracts are renewed do not create any liberty or property interests in the expectation that these general patterns will hold true for particular persons. See *Greenholtz* v. *Nebraska Penal Inmates, supra; Meachum* v. *Fano, supra; Leis* v. *Flynt, supra; Board of Regents* v. *Roth, supra.*

est turns on whether a statute or rule creates an entitlement conditioned on the existence of particular facts. *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1, 9–12 (1978); *Dixon* v. *Love*, 431 U.S. 105, 112–113 (1977); *Meachum* v. *Fano*, *supra*, 427 U.S. at 226–227; *Wolff* v. *McDonnell*, 418 U.S. 539, 546 (1974); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332.

The language and structure of statutes and regulations should be dispositive in determining whether a person has a legitimate and mutual expectation of entitlement in matters relating to complex social welfare programs such as Medicare and Medicaid. If the rules create a particular substantive entitlement turning on provable facts, there is a "property" interest; otherwise there is not. Reliance on "practices," a shaky short of interest at best (see note 34, *supra*), cannot be the source of an interest not conferred by such statutes; otherwise the beneficiaries of a program would have substantive entitlements more extensive than Congress created for them. As we argue below, the statutes and regulations defining patients' entitlements create only a precisely limited interest in continued residence at a *particular* nursing home, and the removal of Town Court from the program does not affect any patient's legitimate claims of entitlement.

B. *The Medicare and Medicaid Statutes And Regulations Create No Legitimate And Mutual Expectations of Entitlement on the Part of Patients To Continued Program Participation By the Particular Nursing Home In Which They Reside*

Klein v. *Califano*, *supra*, on which the court relied here, invoked two provisions of the Medicaid statute

and implementing regulations as support for its conclusion that Medicaid patients have a property interest in the continued program participation of the nursing home in which they reside.[35] First, it cited 42 U.S.C. 1396a(a)(23), which provides that "any individual eligible for medical assistance * * * may obtain such assistance from any institution * * * qualified to perform the service * * *." Second, it cited 42 C.F.R. 449.12(a)(1)(ii)(B)(4),[36] which provides that every participating nursing home must establish policies and procedures to ensure that each resident "[i]s transferred or discharged only for medical reasons or for his welfare or that of other patients * * *."[37] The court concluded (586 F.2d at 258) that these provisions,

[35] Although this case directly involves only the Medicaid program, the due process considerations pertaining to that statute pertain also to the Medicare program. Because the administration of the two programs is related, we will usually not distinguish between the two programs.

[36] Formerly codified and cited by the court as 45 C.F.R. 249.12(a)(1)(ii)(B)(4)(1976).

[37] The court in *Klein* also noted (586 F.2d at 257) another provision, which entitles patients to notice and an opportunity for hearing with respect to agency action "resulting in suspension, reduction, discontinuance or termination of assistance." 42 C.F.R. 449.20. The district court in *Klein* relied on that provision to find a protectable property interest because it concluded that termination of the home caused trauma to Medicaid patients required to relocate to another facility and that termination had the effect of reducing those patients' level of benefits by the amount of the "transfer trauma." See 586 F.2d at 259 n. 16. The court of appeals found it unnecessary to address that conclusion (*ibid.*). The conclusion is insubstantial. The "assistance" referred to by the regulation is the monetary amount of benefits, not the psychic welfare that the benefits provide. If the regulation meant to refer to broader psychic considerations—which could include the entire regimen of patient care, down to the color of paint on the walls—surely it would have said so.

permitting a recipient to obtain medical care from a freely selected provider and * * * prescribing limited conditions for transferring a resident of a nursing home created a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer.

What this conclusion means is not clear. To the extent it suggests that patients have a statutory right to covered care by any nursing home of their choosing, whether or not it is a qualified nursing home under the statutory standards, it is manifestly incorrect. No statute or regulation creates such a right. That would be contrary to the express language of 42 U.S.C. 1396a(a)(23), which entitles eligible patients to obtain medical assistance only from "any institution * * * *qualified* to perform the service" (emphasis supplied). No rule suggests that any patient has an interest or legitimate claim of entitlement that a particular home be deemed qualified. And unless a home is found qualified, the entitlement created by the statute does not come into play.

Moreover, the regulation restricting transfers of patients[38] is by its terms and plain intent (as the concurring opinion expressly acknowledged (Pet. App. 39a))[39] a limitation only on actions by qualified *providers* against patients; it establishes no entitlement with respect to action against the provider, and it does not require that any provider be deemed qualified. The regulation simply limits the discretion of

[38]42 C.F.R. 449.12(a)(1)(ii)(B)(4).

[39]The concurring opinion states (Pet. App. 39a): "Similarly, the majority [opinion] undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW."

qualified providers to transfer patients because of facts personal to the patients; it does not limit the discretion of HEW to terminate providers because of facts personal to the providers. It does not promise patients that any provider will be retained in the program.

The *Klein* court recognized (586 F.2d at 258) that a determination that a home was unqualified would be a legitimate cause for transferring the patients; it must follow that neither the statute nor the regulation establishes a legitimate claim of entitlement to residence in a particular home.

The *Klein* opinion thus suggests that it may be based on an alternative rationale, which was expressly endorsed by the concurring opinion (Pet. App. 43a)—that even if an eligible recipient has a property interest only in receiving care from a qualified provider, a governmental determination that the provider is not qualified "impinges" on that interest and gives the recipient procedural rights with respect to that determination. See 586 F.2d at 258. If that is the basis of the court's holding, it would have consequences far beyond the administration of the Medicare and Medicaid programs. What the patients challenge in this case is governmental action directed against and primarily affecting the interests, not of the patients, but of a third party—the nursing home. If the court of appeals were correct that governmental action with respect to A must be preceded by hearings for B, C, D, and E, who may be affected by A's response to the governmental decision, then due process procedures would be required in a host of situations in which, we submit, no one could have a reasonable expectation of entitlement.

For example, a worker may have a constitutionally protected liberty interest in working for the employer of his choice, including an employer performing government contracts. A worker also may have a "property" interest in employment under a contract or collective bargaining agreement. He may be very substantially affected by government cancellation or non-renewal of his employer's contract. The court of appeals' analysis suggests that such cancellation or non-renewal would impinge on the worker's "liberty" or "property" interests, and that every worker therefore would have a personal right to notice and an opportunity to be heard with respect to that action. Similarly, because a criminal defendant may have a Sixth Amendment right to be represented by an attorney of his choosing, every one of an attorney's clients would have a personal right to be heard on the matter of his lawyer's disbarment. In the context of the Medicare and Medicaid statutes, the principle suggested by the court of appeals would mean that patients have a right to notice and hearing with respect not only to actions seeking to terminate the program participation of their nursing homes but also to actions seeking to revoke the professional licenses (and thus the program participations) of their physicians, pharmacists, or any other provider of medical services. Contrary to the suggestion of the court of appeals, however, we submit that in none of these situations could anyone reasonably or legitimately expect that the indirect consequences of the governmental action give him a personal right to dispute, and be heard with respect to, the merits of the action—in effect, a right vicariously to assert and defend the rights of others.

Although this Court has never been presented directly with this kind of claim of vicarious constitutional rights, that concept is contrary not only to ordinary expectations but also to established principles.[40] The Third Circuit's approach makes the *nature* of the affected interest largely irrelevant and makes the weight of the interest (*i.e.*, the consequences of the governmental action) controlling; it places no discernible limit on the liberty and property interests entitled to the procedural protections of the Due Process Clause. Most governmental actions reverberate through a complex economy. Decisions denying utilities the right to build new plants could be viewed as affecting the interests of consumers in contracting for electricity and thus requiring hearings for them. Other decisions could affect indirectly some other personal but constitutionally recognized interest (*e.g.*, the right to work, marry, bear children, travel, live in a location of one's choice, and so forth). But this Court rejected in *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, the argument that all important governmental decisions implicate the procedural protections of the Due Process Clause. See also *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (when a legislative type of decision broadcasts its effects to many people, there is no need for each to be offered a hearing).

For those reasons, when some governmental action is directed against and primarily affects the protected property interests of one party, and only indirectly affects the property interests of another, that person

[40] It is settled, for example, that a person can litigate about the constitutional rights of third parties only in unusual circumstances. See *Craig* v. *Boren*, 429 U.S. 190, 192-197 (1976).

ordinarily has no legitimate and mutual expectation of entitlement in the matter. Congress could, of course, create such a vicarious entitlement, but there is no such indication with respect to Medicare or Medicaid; indeed, the statutory and regulatory scheme manifests quite the contrary intent. As we have noted, 42 U.S.C. 1396a(a)(23) entitles eligible patients to obtain medical assistance only from "any institution * * * qualified to perform the service." The statutes and regulations set forth in detail the standards and procedures by which HEW and the responsible state agencies are to determine whether nursing homes and other providers are qualified to perform covered services and receive payment. Nothing in the statutes and regulations suggests an intent to give patients a right to dispute and be heard with respect to those determinations by HEW and the state agencies. In short, the only legitimate claims of entitlement of patients are: (1) to participate in the program if they meet the statutory age, health, and income qualifications, and (2) if they are admitted to the programs, to receive care from any of the providers then determined by HEW and the states to be qualified. They have no personal entitlement to dispute the determination that someone is unqualified to be a provider, and they have no entitlement to any particular outcome in contests about qualifications.

Moore v. *Johnson*, 582 F.2d 1228 (9th Cir. 1978), supports this approach. The court rejected a contention by patients in a veterans hospital that they were entitled to personal hearings before the Veterans Administration could order them to be transferred on the ground that the hospital did not satisfy statutory standards. The court held that the residents had no

constitutionally protected property interest in receiving care at a particular facility. The court stated (582 F.2d at 1233–1234) that:

> To the extent that they believed that the Administrator *must* furnish domiciliary care and vocational training benefits *to them* at *specific facilities in Los Angeles* their expectations * * * are mere 'unilateral expectations.' As such, they are not property interests.

Similarly, in *Caton Ridge Nursing Home* v. *Califano*, No. 78–1290 (4th Cir. Feb. 26, 1979), the court held that a Medicaid patient had no right to a hearing on the termination of her home's participation when the home was removed from the program because of its failure to correct structural and other defects constituting a fire hazard.[41] See also *Nicobatz* v. *Weinberger*, [1974] Medicare and Medicaid Guide (CCH) ¶27,427; *Cook* v. *Bates*, [1978 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶29,410.[42]

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[41] *Klein* held that the district court's opinion in *Caton Ridge* (later affirmed by the Fourth Circuit) was inapposite because there is a distinction between services rendered to the patients (about which they "could be expected to contribute relevant information") and matters such as structural defects, about which they could not. 586 F.2d at 260 n.17. It seems doubtful whether most matters could be classified so readily; but in any event there is no basis for concluding, either from the statute or general principles, that the existence of a constitutionally protected property interest depends on the amount of "relevant information" a person can contribute to a governmental decision. The nature of the entitlement—not the "usefulness" of a hearing—is what marks the existence of a property interest.

[42] Several other decisions have dealt with the procedural rights of nursing homes with respect to terminations. The Second and Third Circuits have held that nursing homes have no right to a pre-termination hearing, and that the post-termination hearing provided by the statutes and regulations are adequate. *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975);

C. *The Rationale of the Concurring Opinion Does Not Support the Conclusion That Medicare and Medicaid Recipients Have A Property Interest In the Continued Program Participation of The Nursing Home In Which They Reside*

The concurring opinion written by Judge Adams in this case (Pet. App. 30a–60a) offers a justification for the application of the Due Process Clause that is quite distinct from the rationale offered by the opinion for the court in *Klein*. Because the concurring opinion here apparently states the dispositive considerations for the judges who cast the deciding votes,[43] we now address Judge Adams's approach to the identification of property interests.

Town Court Nursing Center, Inc. v. *Beal*, 586 F.2d 266 (3d Cir. 1978) (en banc) ("*Nursing Home*"). The Seventh Circuit has held that a nursing home is entitled to a pre-termination hearing. *Hathaway* v. *Mathews*, 546 F.2d 227 (1976). Because Town Court did not seek review of the decision in *Nursing Home*, that question is not presented here.

[43] It is quite difficult to identify any opinion for the court in any of the cases. Judge Van Dusen's opinion in *Klein* was signed by Judges Aldisert, Adams, Gibbons, Weis, and Higginbotham: It was adopted as the rationale for the disposition in this case, announced by Judge Aldisert (the announcement was joined by Judges Gibbons, Weis, and Higginbotham). But Judge Adams stated (Pet. App. 37a–39a, 41a & n.20) that the rationale of Judge Van Dusen's opinion in *Klein* is not persuasive; he is joined in this view by Judges Gibbons, Weis, and Garth, two of whom joined both Judge Van Dusen's opinion in *Klein* and Judge Aldisert's opinion here. (Judge Garth dissented in *Klein* on mootness grounds.) Because three judges (Chief Judge Seitz and Judges Rosenn and Hunter) concluded that patients had no property interest in the renewal of the home's provider agreement, the rationale of Judge Adam's "concurring" opinion may well be the Third Circuit's holding. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

The concurring opinion advances three related arguments in support of the conclusion that patients have a constitutionally protected property interest in this case. First, it argues that even if no statutory and regulatory provision, considered alone, establishes a property interest, the statutes and regulations considered together "paint * * * [a] landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert" (Pet. App. 39a). Second, it argues that the practical consequences of a termination for "physically weakened, economically disadvantaged" patients "are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in *this* case" (*id.* at 45a). Third, it argues that the scope of federal transfer payment programs, and their substantial effects on society, should make courts more receptive to due process claims relating to "those new forms of property" (*id.* at 46a). These arguments reflect a philosophical position that is fundamentally at odds with controlling decisions of this Court.

First, the position that "property" interests can be found not only in the terms of the applicable statutes and regulations but also in their "landscape" (or perhaps "flavor") is quite wrong. "Landscapes" do not confer claims of entitlement turning on particular facts; they do not set up mutual expectations. Large social welfare programs like Medicare and Medicaid have precise terms set by Congress; courts cannot properly enlarge the substantive rights of beneficiaries by drawing out of "landscapes" rules that Congress did not put there. The provisions of the statutes and regulations are drafted by Congress and the administrators with painstaking care; they are continu-

ally revised and amended in light of experience and changing conditions. Accordingly, in this context particularly, courts should hew closely to the precise terms of the statutes and regulations in determining the content of legitimate and mutual claims of entitlement. The suggestion that the "landscape" is full of unspecified property rights amounts to an approach that creates property rights solely on the basis of unilateral expectations.[44] And unilateral expectations are not "property." See *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 4–5; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577.

The same principle applies to the concurring opinion's third point; *i.e.*, that courts should be "particularly receptive to claims arising from federal transfer programs." Congress knows how to establish entitlements giving rise to "property." It need only set up a substantive rule of decision, making personal entitlements turn on determinable facts. See *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332. There is no basis or need for courts to impose procedural requirements on such programs beyond those required by statute or by the identification of substantive entitlements.

The concurring opinions' second argument—that the practical consequences of moving from one nursing

[44] It is possible that Judge Adams' reference to the statutory "landscape" was meant to refer to possible ambiguities in the statutory language concerning the rights conferred by the statute, and that he was engaging in the ordinary judicial function of interpreting vague or ambiguous statutory terms. But the concurring opinion does not support that view of the "landscape" approach, since it does not attempt to resolve statutory ambiguities but instead seems to find property rights from the flavor or gestalt of the statute.

home to another are relevant and persuasive considerations in determining the existence of constitutionally protected interests—squarely conflicts with this Court's decisions and overlooks a number of considerations pertinent to the administration of the Medicare and Medicaid programs. This Court has consistently rejected the proposition that the weight of the effect of governmental action on a person's interests, however substantial, is relevant in determining whether that interest is "liberty" or "property." Once it is determined that liberty or property is at stake, the weight of the interest may be very important in determining what process is due (*e.g.*, *Mathews* v. *Eldridge*, *supra*), but it is not relevant to the threshold inquiry. See pages 23–26, *supra*.

We fully recognize that the termination of a nursing home's program participation can have a substantial effect on Medicare and Medicaid patients residing in the home. That is one of the reasons why current HEW and state survey procedures require observation of and interviews with patients in certification surveys.[45] Indeed, because of its concern about the consequences of its certification and termination decisions on many patients, HEW plans to initiate rulemaking in the near future to consider what further procedures may be appropriate for patient participation in the termination process. Such participation, established by a rulemaker with the benefit of the views of interested parties throughout the nation, may well be desirable as a matter of administrative policy; that fact, however, does not suggest the appropriateness of imposing procedural requirements on the responsible agencies as a matter of

[45] See page 6 and note 17, *supra*.

constitutional law. Quite the contrary is true, because there are a number of considerations, other than the effects of terminations on certain patients, that are relevant to that policy determination and that were overlooked by the concurring opinion.

First, although termination of a home may have a significant consequences for some patients, the statute requires HEW to consider the interests of all the home's Medicare and Medicaid patients in receiving decent and acceptable medical care. The termination or non-renewal of a home's participation in the programs is the principal sanction available to HEW and the states for ensuring that patients for whom federal and state funds are expended will receive the level and quality of care that Congress and the states intended. The importance of that sanction in furthering the statutory purpose is reflected in the fact that provider agreements must be renewed each year following an annual survey and recertification. Rigid requirements that all covered patients be given notice and opportunity for hearings prior to termination (and presumably to judicial review following exhaustion of the administrative procedures) might substantially weaken the effectiveness of that sanction, to the general and significant detriment of all of the patients to the home.[46] Hearings and review inevitably would delay any decision. The delay in this

[46] For example, if HEW and the states seek to terminate a home because of significant deficiencies in medical staffing and care, requiring them to continue funding until some patients have exhausted an opportunity, administratively and judicially, to express their views that the level of staffing and care is adequate (or preferable to transfer) would substantially lessen the incentives of many homes promptly to correct the deficiencies. And the vindication of the procedural rights of the few may be small solace to the many receiving inadequate care in the interim.

case exceeds two years. Indeed, in *Nursing Home* the court of appeals cited these problems as support for its holding that Town Court itself had no right to an evidentiary hearing prior to the effective date of the termination. 586 F.2d at 278.

A second relevant consideration also was identified in *Nursing Home:* any pre-termination hearing requirement might undermine the strong "public interest in preserving scarce financial and administrative resources" (586 F.2d at 278). In that case the court concluded that "the cost of providing pre-termination hearings would be substantial." It may be assumed that the cost would be even more substantial if hearings must be provided not just to the home but also to all of its patients. See also *Califano* v. *Boles*, No. 78–808 (June 27, 1977), slip op. 2–5. Moreover, because the statutes and existing procedures already require that patients be interviewed during the survey process that leads to termination (see note 17, *supra*), and already provide nursing homes with a right to post-termination hearings, a rulemaker considering the appropriateness of enhancing patient participation in the decisionmaking process might well consider whether avoidance of duplication and waste of administrative resources warranted additional and substantially duplicative procedures.

Third, apart from the adverse consequences of such a rigid requirement, there seems little basis for the assumption of the court of appeals (see Pet. App. 54a; *Klein* v. *Califano*, *supra*, 586 F.2d at 258) that such a requirement would provide a significant incremental contribution to the correctness of the administrative decision. Many of the statutory and regulatory standards defining a qualified nursing facility pertain to matters about which the patients have little or no qualifica-

tion to express an informed view—*e.g.*, the compliance of the physical structure with safety and fire code requirements, the adequacy of staff training, the competence of physician care, and so on. That is the principal reason why the Fourth Circuit in *Caton Ridge Nursing Home* v. *Califano*, *supra*, held that a Medicaid patient had no right to a hearing on the termination of her home, which was terminated because of its failure to correct structural and other defects constituting a fire hazard. But even on matters about which the patients have more direct information, it may be doubted whether an absolute pre-termination hearing requirement would provide a substantial incremental contribution to the accuracy of the decisionmaking process.

Finally, as the dissenting opinion concluded (Pet. App. 65a), the survey and termination process provides ample opportunity for the party most directly concerned with certification and termination—the home itself—to consult with its patients and present information in support of the position that termination is not warranted. As this case illustrates, nursing homes have that opportunity prior to termination even though they are not entitled to a formal evidentiary hearing until after the effective date of termination.

In sum, the reliance of the concurring judges on the practical effects of termination on patients, as a basis for finding a constitutionally protected property interest, not only is contrary to this Court's decisions but also overlooks significant countervailing policy considerations. All of the policy considerations would be relevant to a rulemaker fashioning procedures dealing with patient participation in the survey and termination process, and will undoubtedly be considered carefully by HEW in the rulemaking it plans to initiate. But they

are not and should not be relevant in determining whether patients have a constitutional right to a hearing before a particular home's contract is not renewed.[47]

[47] As we have remarked (see note 26, *supra*), the court of appeals did not specify what process is "due," except to hold that the hearing must be offered to patients before the nursing home's eligibility is terminated. Pet. App. 29a-30a; *Klein* v. *Califano*, *supra*, 586 F.2d at 260-261. The question presented by the petition subsumes the question whether this requirement that the hearing come before, rather than after, the termination is correct.

We believe that there are substantial difficulties with the court's conclusion, even if it is right that the patients' "property" interests are at stake. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343, emphasized "the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." In most cases, as in *Eldridge* and *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), all constitutional requirements can be satisfied by a hearing after the initial action has taken place.

Eldridge concluded that courts should inquire into the private interest at stake, the risk of an erroneous deprivation, the value of additional safeguards, and the government's interest in avoiding excessive procedural entanglements, in deciding what process is "due" for particular kinds of decisions. 424 U.S. at 335. These considerations suggest that a prior oral hearing is not consititutionally necessary. First, the termination of a particular provider does not affect any patient's right to receive benefits; it means only that the patient will be required to move from one place to another. The patient's interest is therefore less substantial than the beneficiary's interest in cases such as *Eldridge*, in which the government terminated the person's own right to benefits. Second, additional safeguards may be of little value in avoiding erroneous terminations. The nursing homes have the greatest interest in avoiding termination; they may be expected to contest the decision and to assemble relevant information. Survey teams already interview patients and take their views into account in recommending whether the home should be terminated. The additional information that could be contributed by patients on subjects such as fire safety, the qualifications of the nursing staff, and the nutritive content of the food would be slight. Moreover, questions concerning the qualifica-

tions of the staff, the safety of the building, and so on, are amenable to accurate resolution after a combination of on-site inspections and review of documentary evidence, which the regulations now require. It is unlikely that oral hearings would add greatly to what the inspections and documents reveal. See also *Califano* v. *Yamasaki*, *supra*, slip op. 13; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343–347; *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971), all of which hold that the Constitution does not require prior oral hearings when the subject is susceptible of documentary proof. Third, there is a significant governmental interest in avoiding prior oral hearings. Such hearings, as we discuss in the text, would delay the effectiveness of remedial action and thus diminish the ability of federal and state administrators to induce nursing homes to improve their conditions. The government also has a strong interest in minimizing the number of hearings: there is little to be gained by offering 199 hearings on the termination of Town Court (one for each of the 198 patients, and one for Town Court itself). One hearing per decision ought to be enough.

We have not addressed this question at greater length, however, because the court of appeals did not define the content of the due process requirements beyond specifying that the hearings should occur before the termination. The practical effects of pre-termination hearings are strongly influenced by their procedural content. There are dramatic differences among the kinds of prior hearing required by *Goss* v. *Lopez*, 419 U.S. 565 (1975) (brief, informal consultation), by *Parham* v. *J.L.*, No. 75–1690 (June 20, 1979) (the informed decision of a medical professional), and by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (full adversarial hearing with counsel and cross-examination). We therefore believe that, if the Court holds that the patients have a "property" interest in the continued status of a particular home as a provider, it may be most appropriate to remand the case for further consideration of what process is due, and whether that process must take place before a home may be terminated from participation in the program.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

42 U.S.C. 1395 provides in pertinent part:

(j) Skilled nursing facility

The term "skilled nursing facility" means (except for purposes of subsection (a)(2) of this section) an institution (or a distinct part of an institution) which has in effect a transfer agreement (meeting the requirements of subsection *(l)* of this section) with one or more hospitals having agreements in effect under section 1395cc of this title and which—

* * * * *

(9) in the case of an institution in any State in which State or applicable local law provides for the licensing of institutions of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing institutions of this nature, as meeting the standards established for such licensing;

* * * * *

(15)[1] meets such other conditions relating to the health and safety of individuals who are furnished services in such institution or relating to the physical facilities thereof as the Secretary may find necessary.* * *

1395cc provides in pertinent part:

(a)(1) Any provider of services (except a fund designated for purposes of section 1395f(g) and section 1395n(e) of this title) shall be qualified to participate under this subchapter and shall be eligible for payments under this subchapter if it files with the Secretary an agreement—

(A) not to [etc]* * *

* * * * *

An agreement under this paragraph with a skilled nursing facility shall be for a term of not exceeding

12 months, except that the Secretary may extend such term for a period not exceeding 2 months, where the health and safety of patients will not be jeopardized thereby, if he finds that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services by such facility or if he finds it impracticable within such 12-month period to determine whether such facility is complying with the provisions of this subchapter and regulations thereunder.

* * * * *

(b) Termination of agreement

An agreement with the Secretary under this section may be terminated (and in the case of a skilled nursing facility, prior to the end of the term specified in subsection (a)(1) of this section)—

(1) by the provider of services at such time and upon such notice to the Secretary and the public as may be provided in regulations, except that notice of more than 6 months shall not be required, or

(2) by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in regulations, but only after the Secretary has determined (A) that such provider of services is not complying substantially with the provisions of such agreement, or with the provisions of this subchapter and regulations thereunder, or (B) that such provider of services no longer substantially meets the applicable provisions of section 1395x of this title,* * *

42 U.S.C. 1395ff provides:

(a) Entitlement to and amount of benefits

The determination of whether an individual is entitled to benefits under part A or part B, and the

determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

(b) Appeal by individuals

(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

(A) Whether he meets the conditions of section 426 or section 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of this subchapter, or section 1395i-2 of this title, or section 1819, or

(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) Notwithstanding the provisions of subparagraph (C) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

(c) Appeal by institutions or agencies

Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services, or with any determination described in section 1395cc(b)(2) of this title, shall be entitled to a hearing thereon by the Secretary (after reasonable notice and opportunity for hearing) to the same extent as is provided in section 405(b) of this title, and to judicial review of the

Secretary's final decision after such hearing as is provided in section 405(g) of this title.

42 U.S.C. 1396a provides in pertinent part:

(a) Contents

A State plan for medical assistance must—

* * * * *

(23) Except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services; * * *.

* * * * *

(28) provide that any skilled nursing facility receiving payments under such plan must satisfy all of the requirements contained in section 1395x(j) of this title, except that the exclusion contained therein with respect to institutions which are primarily for the care and treatment of mental diseases and tuberculosis shall not apply for purposes of this subchapter;

42 U.S.C. 1396; provides:

(a) Whenever the Secretary certifies an institution in a State to be qualified as a skilled nursing facility under subchapter XVIII of this chapter, such institution shall be deemed to meet the standards for certification as a skilled nursing facility for purposes of section 1396a(a)(28) of this title.

(b) The Secretary shall notify the State agency administering the medical assistance plan of his ap-

proval or disapproval of any institution which has applied for certification by him as a qualified skilled nursing facility.